Supreme Court, U.S.
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DEC

No. 00-689

IN THE

Supreme Court of the United States

MICHAEL BOLTON, *et al.*,
Petitioners,

v.

THREE BOYS MUSIC CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT

A jury in 1994 found petitioners liable for copyright infringement. The district court denied petitioners' post-trial motions and entered judgment on the verdict. The Ninth Circuit, likewise declining to disturb the jury verdict, affirmed.

1. This case involves a song entitled "Love Is A Wonderful Thing" written and recorded by the Isley Brothers in the mid-1960s. By 1966, the Isley Brothers were already a prominent rhythm and blues group, having just released a string of hit songs with the Motown record label. Seeking to capitalize on that success, their earlier label, United Artists, released the already-recorded "Love Is A Wonderful Thing" as a 45 rpm single. Major industry publications called

attention to the song—the copyright in which is held by respondent. Pet. App. 3a.[1]

The song almost made Top 100 charts. *Id.* According to disc jockeys playing records at the time, the song was played repeatedly during 1966 and 1967 on radio stations in New York, Philadelphia, Buffalo, and Chicago—in the last of which it was played intensely, at least four times a day during a 2-6 month period. *Id.* at 10a. It would reasonably be inferred that many other radio stations across the country played the song as well. (Information from the royalty organization, Broadcast Music Inc. (BMI), was unavailable, because BMI, through no fault of the Isley Brothers, failed to register the song. Tr. 400-02.) The song was even performed on widely broadcast television shows in 1966 or 1967, certainly on New York stations and, according to disputed testimony, probably also on New Haven/Hartford stations. Pet. App. 10a, 12a. The song, eventually included in a 1991 Isley Brothers compact disc, became "part of the catalog" (Tr. 589) and has continued to be played on radio stations to the present day. Pet. App. 10a.

In 1966, respondents Michael Bolton (then age 13) and Andrew Goldmark (then age 15) were teenagers living in southwest Connecticut (New Haven and New Canaan, respectively). *See id.* at 9a. Bolton testified that his brother had a good record collection and, more importantly, that he himself "had been listening to rhythm and blues music by black singers since he was 10 or 11, 'appreciated a lot of Black singers,' and as a youth was the lead singer in a band that performed 'covers' of popular songs by black singers." *Id.* at 9a-10a. Indeed, throughout his career, from the 1960s into the 1990s, Bolton continued to perform "covers" of rhythm and blues songs written and previously recorded by

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[1] Pursuant to Rule 29.6 of the Rules of this Court, respondent states that it has no parent companies and that no publicly held company owns ten percent or more of its stock.

black artists like the Isley Brothers. *Id.* at 3a. Bolton, who acknowledged "some" familiarity with Isley Brothers songs on the witness stand (Tr. 475), had previously admitted to being a fan of their music. Ronald Isley testified that, at a concert in 1988, Bolton said, "'I know this guy. I go back with him. I have all his stuff.'" Pet. App. 10a. Isley's wife "testified about that meeting that Bolton said, 'This man needs no introduction. I know everything he's done.'" *Id.*

In 1990, Bolton and Goldmark wrote a song also called "Love Is A Wonderful Thing," which, with considerable success, they released as a single and on an album in 1991. *Id.* at 3a-4a. A tape of their working session developing the song contains a remark by Bolton wondering whether "the song they were composing was Marvin Gaye's 'Some Kind Of Wonderful.'" *Id.* at 11a (footnote omitted). At trial, Bolton answered affirmatively to the question whether, according to the tape, "there [was] a question in your mind as to whether or not what you have just sung, what you and Mr. Goldmark have just done might belong to someone else." Tr. 947-48.

2. Respondent sued for damages for copyright infringement in 1992. Pet. App. 4a. The jury, which listened to the Isley Brothers song and the Bolton/Goldmark song several times, heard testimony about all the relevant infringement issues, including the issue of petitioners' access to the Isley Brothers song and the issue of the substantial similarity of elements in the Bolton/Goldmark song to original expression in the Isley Brothers song. Specifically, expert musicologists testified about the substantial similarity—in the lyric, pitch, and rhythm of the two songs' critical "title hook" phrases, as well as in other features of the popular songs. Pet. App. 15a.[2]

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[2] "Hook" is a phrase from Tin Pan Alley that "means that portion of the song that the listener tends to remember. And when he hears it again, to recognize it. He says, 'Oh, there's that song again.'" Tr. 608. In both the

The instructions under which the case was tried are not challenged by petitioners. The jury was instructed that, if it found "that there is only a bare possibility as distinguished from a reasonable opportunity that the composers of defendants' song heard plaintiff's song before they composed defendants' song," it "must conclude that access has not been established." Tr. 1426. The jury then answered "yes" to the question, "Did either Michael Bolton or Andrew Goldmark have 'access' to Plaintiff's song?" C.A. Supp. E.R. 63. The jury also found "substantial similarity" of both ideas and expression. *Id.* at 63-64. And the jury, even after finding access and substantial similarity, separately found that those findings warranted the inference that copying in fact occurred. *Id.* at 65. The jury thus found infringement. Pet. App. 4a.

The same jury, after hearing additional evidence, then determined the extent of the unauthorized borrowing from the Isley Brothers song. It found that the infringement produced 66 percent of the profits from the Bolton/Goldmark song, which in turn produced 28 percent of the profits from the album on which it appeared. *Id.* The actual accounting of the profits was performed subsequently by a special master and the district court. *Id.* The damages ($5.4 million) were also allocated among the several petitioners, the lion's share being borne by petitioner Sony Music. *Id.* The district court subsequently denied petitioners' post-trial motions. *Id.* at 26a-60a.

3. The court of appeals affirmed. *Id.* at 1a-23a. The court of appeals recited the accepted standards not only for proving copying through "fact-based showings that the defendant had 'access' to the plaintiff's work and that the two works are 'substantially similar'" (*id.* at 5a) but also for appellate

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Isley Brothers and Bolton/Goldmark songs, the "hook" phrase is also the title of the song.

review of a jury verdict for substantial evidence (*id.* at 6a). Applying those standards, the court held that there was sufficient evidence to support a reasonable finding of access (*id.* at 7a-13a), that there was sufficient evidence to support a reasonable finding of substantial similarity and to permit rejection of the claim of independent creation (*id.* at 13a-16a), and that no showing of similarity greater than "substantial similarity" was required to offset a "weak" but nevertheless sufficient showing of access (*id.* at 16a-17a). The court of appeals also rejected petitioners' other attacks on the judgment, which it accordingly affirmed. *Id.* at 17a-23a.

ARGUMENT

Petitioners' three questions, the first of which rests on a misdescription of the court of appeals' decision, are all meritless. Although they claim otherwise, petitioners have not identified any ruling by the court of appeals that conflicts with any decision of another court of appeals or of this Court. The court's decision is a correct application of established legal standards to the facts of this case. The petition should be denied.

A. Access

Petitioners' principal contention is that the court of appeals "resurrected the discredited 'slightest doubt' test formulated over fifty years ago in *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946)" and "departed from the test applied in other circuits under which the plaintiff must demonstrate that the defendant had a reasonable opportunity (not merely a bare possibility) to have actually heard the work allegedly copied." Pet. 2; *id.* at 7. This two-part contention, however, rests on a two-part distortion of the Ninth Circuit's opinion. As is obvious on the face of the opinion, the Ninth Circuit did not embrace (indeed, even mention) the "slightest doubt" test or reject the "reasonable opportunity" standard in favor of a

"bare possibility" standard. The conflicts alleged by petitioners are thus imaginary.

As to *Arnstein*: a simple reading of the opinion below puts beyond question that the Ninth Circuit nowhere quoted, cited, or relied on the "slightest doubt" standard that *Arnstein* long ago used for the *general Rule 56 standard for summary judgment* (which is not tied to copyright cases specifically). Contrary to petitioners' accusation (Pet. 2, 9-10), neither in the decision in this case nor elsewhere has the Ninth Circuit rejected the now-governing summary-judgment standards of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), in favor of the old *Arnstein* standard.[3] It is therefore beside the point that, as petitioners say (Pet. 7-8), courts outside the Ninth Circuit have repudiated the old *Arnstein* "slightest doubt" standard, for the Ninth Circuit has not adopted that standard; indeed, even before *Celotex* and *Liberty Lobby*, the Ninth Circuit expressly acknowledged the disapproval of that aspect of *Arnstein*. *See Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977) ("*Arnstein*'s alternative holding that summary judgment may not be granted when there is the slightest doubt as to the facts has been disapproved.").

The Ninth Circuit did rely on aspects of *Arnstein* other than the "slightest doubt" standard. Pet. App. 6a (copying and improper appropriation are issues of fact; sufficiency review on appeal is not de novo redetermination of facts), 12a-13a (credibility is left to jury). But that reliance is unobjectionable and of no moment here. Those aspects of *Arnstein*—

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[3] The Ninth Circuit regularly invokes and follows the *Celotex/Liberty Lobby* standard in preference to the older "slightest doubt" standard. *See, e.g., Hooks v. Clark County School Dist.*, 228 F.3d 1036, 1038 (9th Cir. 2000); *Lucht v. Molalla River School Dist.*, 225 F.3d 1023, 1025 (9th Cir. 2000); *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000); *Rand v. Rowland*, 154 F.3d 952, 956-57 (9th Cir. 1998).

substantive copyright-law principles and the usual cautions about second-guessing credibility and other factual determinations in reviewing sufficiency of the evidence—are not the subject of any repudiation by other courts and remain perfectly good law. Not one of petitioners' authorities cited as creating a conflict (Pet. 7-8 & n.4) disagrees with any of those aspects of *Arnstein*, which petitioners themselves do not openly question. The cited substantive copyright standards remain valid (*see Sid & Marty Krofft Television*, 562 F.2d at 1165),[4] as do the principles of appellate review of jury determinations, which are fully in accord with the settled standards most recently restated by this Court in *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000).[5] Nothing about *Arnstein*, therefore, or the standards

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[4] *Arnstein*'s pronouncements on copyright law are still cited as authoritative by the leading treatises. *See, e.g.*, II P. Goldstein, *Copyright* § 7.2.1 at 7:7 nn.4, 5, 7:13 n.18 (2d ed.); 4 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.02 at 13-15 n.3, 13-18 n.13, 13-20 n.15.

[5] "[T]he standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.' *Anderson v. Liberty Lobby*, 477 U.S. at 250-51; *see also Celotex*, 477 U.S. at 323. It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.

"In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555(1990); *Liberty Lobby*, *supra*, at 254; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n. 6 (1962). 'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.' *Liberty Lobby*, *supra*, at 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See [9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2529, at 299 (2d ed. 1995)]. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that

announced or applied by the Ninth Circuit for review of the jury verdict in this case, justifies further review by this Court.

As to the "reasonable opportunity" standard, petitioners again rely on a mischaracterization of the court of appeals' opinion. Although petitioners say otherwise (without citation), the court of appeals nowhere rejected, doubted, or questioned the very distinction—requiring a "reasonable opportunity" for access, and deeming a "bare possibility" insufficient (Pet. 2)—petitioners urge. To the contrary, that is the precise standard the court of appeals expressly embraced. Pet. App. 7a ("Proof of access requires . . . a 'reasonable opportunity' or 'reasonable possibility' of viewing the plaintiff's work. We have defined reasonable access as 'more than a "bare possibility." ' " (citations omitted)).

It is thus fanciful to say that the court of appeals adopted incorrect legal standards governing proof of copying through access (along with substantial similarity). There is no dispute here that, because copying must be proved indirectly in most situations, a jury is permitted (not required) to infer copying from proof that the defendants had a reasonable opportunity to hear the copyrighted work and that the defendants' work contains expression substantially similar to protectible elements of the copyrighted work, with copying not having to be conscious to be actionable. Pet. App. 5a, 7a-8a.[6] Nor is

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that evidence comes from disinterested witnesses.' *Id.*, at 300." 120 S. Ct. at 2110 (internal citations shortened).

[6] These long-established principles rest on the recognition, as explained in the Ninth Circuit by the Recording Industry Association of America (RIAA), that "[a]ctual copying . . . is frequently not susceptible of effective direct proof" and, because "creation is a solitary endeavor, . . . in most instances it would be impossible to prove that the defendant had *actually* been exposed to plaintiff's work," so courts have long recognized the permissibility of inferring access from "evidence of the defendant's 'reasonable opportunity' to have viewed or heard plaintiff's work." C.A. *Amicus* Br. of RIAA at 5; *see* 4 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.01[B] at 13-10 to -11, 13-12 ("generally not possible to

there any dispute that these normal means of indirectly proving access and copying are well-recognized to raise simply "'a question of probabilities'" (C.A. *Amicus* Br. of RIAA at 6; *see* II P. Goldstein, *Copyright* § 7.2.1 at 7:7 (2d ed.)), with different factual situations requiring case-specific judgments about whether reasonable minds could find access (and copying) to have been more likely than not. *Id.* § 7.2.1.1 at 7:8, 7:10 ("virtually all decisions in which access is an issue turn on inferential proofs," with a "factual middle ground" between "two poles of probability" where access is certain or speculative). Not surprisingly, then, petitioners do not even attempt to articulate any different legal principles from those adopted by the court of appeals.

With no legal principles at issue, petitioners' complaint reduces to a challenge to the application of correctly articulated legal principles to the facts of this particular case. This type of challenge generally does not merit review, and this case is no exception. Petitioners do not even make an effort to show that other judicial decisions about access, on their facts, conflict with the holding here. Petitioners do not discuss the facts of other decisions at all. Pet. 7-8. Even as they cite some decisions *allowing* findings of access (*e.g.*, *Moore v. Columbia Pictures Ind., Inc.*, 972 F.2d 939, 942-45 (8th Cir. 1992); *Gaste v. Kaiserman*, 863 F.2d 1061, 1066-67 (2d Cir. 1988)), they cite no decision that rejects a finding of access as a matter of law on facts like those here or, indeed,

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establish copying as a factual matter by direct evidence"; "copying is ordinarily established indirectly by the plaintiff's proof of access and 'substantial' similarity" (footnotes omitted)), 13-13 ("copying as a factual matter typically depends on proof of access and probative similarity," though "such evidence does not require the trier of fact to find copying" (footnotes omitted)); *id.* § 13.02[A] at 13-15 (because "it is often impossible for a plaintiff to offer direct evidence that defendant . . . actually viewed or had knowledge of plaintiff's work," sufficient to prove "opportunity to view" to permit inference of copying); II P. Goldstein, *Copyright* § 7.2 at 7:6, § 7.2.1.1 at 7:8 to :10 (2d ed.).

where there was substantial distribution through broadcast media at all.[7]

On the facts in this case, the court of appeals correctly held, a reasonable jury could find access (and copying). There was ample evidence to show that the Isley Brothers song, put out by a hot group, "was widely disseminated on radio and television stations where Bolton and Goldmark grew up" (Pet. App. 10a) and never ceased be played on ("oldies") radio stations up to the present (*id.*). With respect to the likelihood of access, petitioners Bolton and Goldmark were anything but average members of the public. Not just teenagers, they were teenagers with an avid interest in music—and not just any music, but the specific genre of music at issue: "rhythm and blues music by black singers."

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[7] Only four of the authorities cited by petitioners in discussing *Arnstein* (Pet. 7-8), besides *Moore* and *Gaste* (noted in text), involve contested access rulings. *Ferguson v. NBC, Inc.*, 584 F.2d 111, 112 (5th Cir. 1978), involved an "unpublished composition [that] was never performed in this country; nor was it sold, offered for sale, or circulated to the general public." *Selle v. Gibb*, 741 F.2d 896, 898, 902 (7th Cir. 1984), likewise involved a copyrighted song that was never broadcast, but merely played two or three times in Chicago and sent (on tape and on paper) to several recording and publishing companies; "the availability of [plaintiff's] song, as shown by the evidence, was virtually *de minimis*." *Benson v. Coca-Cola Co.*, 795 F.2d 973, 975 (11th Cir. 1986), also involved a song never broadcast, but performed at a small number of "nightclubs, hotels and restaurants" that the accused infringers never visited at the relevant times. Nor was broadcast material at issue in *Takeall v. Pepsico, Inc.*, 809 F. Supp. 19 (D. Md. 1992), *aff'd*, 14 F.3d 596 (4th Cir. 1993), which involved a slogan that the plaintiff author, an "obscure . . . Maryland ventriloquist" (*id.* at 19), had performed "mostly in connection with his crusade against drugs . . . primarily in a limited market and before limited audiences, such as schools and Job Corps centers, to which there is absolutely no evidence that the [defendants] had any access at all" (*id.* at 21). Thus, none of the decisions involved broadcast works; in addition, all involved obscure plaintiffs, in contrast to already well-known performing artists, like the Isley Brothers, whose works are likely to be sought out by substantial numbers of fans of the particular style.

Id. at 9a. And Bolton particularly was not just an avid listener: he was part of a band that actually performed music—music of this very type, "popular songs by black singers." *Id.* at 9a-10a. Bolton, moreover, later "confessed to being a huge fan of the Isley Brothers and a collector of their music," stating of Ronald Isley in 1988 (before the Bolton/Goldmark song was written) that he had "'all his stuff'" and "'kn[e]w everything he's done.'" *Id.* at 10a. And, during the composition of the Bolton/Goldmark song, "Bolton wondered if he and Goldmark were copying a song by another famous soul singer," suggesting " 'that Bolton was contemplating the possibility that the work he and Goldmark were creating, or at least a portion of it, belonged to someone else, but that Bolton wasn't sure who it belonged to.' " *Id.* at 11a. On such evidence, the jury could reasonably infer, under the unchallenged preponderance-of-the-evidence standard, petitioners' access to the copyrighted song.

B. Substantial Similarity

Petitioners' second contention is that the decision below improperly affirms a finding of substantial similarity based on five elements of the Isley Brothers work that, if considered alone, may be unprotectible. Pet. 11-12. Petitioners do not and cannot claim any intercircuit conflict on this issue. *Id.* They contend simply that the ruling conflicts with this Court's ruling in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). This contention is utterly baseless.

Petitioners' contention—that a combination of unprotectible elements cannot itself be protected—is directly contradicted, not supported, by *Feist*. This Court expressly held that, while "facts" are of course not subject to copyright protection, "[a] factual compilation is eligible for copyright if it features an original *selection or arrangement* of facts." 499

U.S. at 350-51 (emphasis added).[8] The decision thus recognizes that an original selection or arrangement of elements too common to be protectible themselves, whether the elements are "facts" or "ideas," is protected by copyright—necessarily so, given the fact that written works and musical compositions typically consist of selections and arrangements of unprotectible words or notes. Nothing whatever in the court of appeals' opinion on substantial similarity (Pet. App. 13a-15a) announces or even hints at a legal principle in conflict with that understanding.

The court of appeals' upholding of the jury's verdict of substantial similarity of protected expression in this case is likewise fully in accord with the *Feist* standard. The jury was instructed to afford no protection to "stock" or "commonplace" elements (Tr. 1426) and to deny liability unless it found substantial similarity under *both* an objective test (based on the experts' analyses) *and* a subjective test (based on its own listening) (Tr. 1427-28). It then specifically found not only that the Bolton/Goldmark song had ideas substantially similar to those of the Isley Brothers song but that "the expression of those ideas in Defendants' song [was] substantially similar to protected expression of those ideas in Plaintiff's song" (C.A. Supp. E.R. 64) and that, based on "all of the evidence, . . . Defendants copied protected expression in Plaintiff's song" (*id.* at 65). The court of appeals itself required satisfaction of the "two-part test of extrinsic similarity and intrinsic similarity" (Pet. App. 14a) and based its substantial-similarity ruling on the jury's determination of originality in selection (*id.* at 15a), even assuming that the pertinent "elements" would not be

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[8] Petitioners agreed, in the court of appeals, that "[t]he district court was correct in noting that 'the compilation and arrangement of uncopyrightable elements in an original manner is protected.'" Bolton C.A. Br. 43 (emphasis on "and arrangement" deleted).

protected in isolation.[9] *Id.* (jury "'found infringement based on a *unique compilation* of those elements'" (emphasis added)). Supporting that holding was ample evidence that the selection and combination of the similar elements—including the particular arrangement of lyric, pitch sequence, and rhythm in the important title hook phrase and the verse/chorus relationship—produced original, protected expression.[10] Even the testimony of *petitioners'* expert offered significant confirmation: as the court of appeals noted, petitioners' expert "conceded that there were similarities between the two songs and that he had not found the combination of unprotectible elements in the Isley Brothers' song 'anywhere in the prior art.'" Pet. App.

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[9] In fact, though respondent's expert initially testified that some or all of the relevant individual elements were commonplace (Tr. 608, 658-59), he later testified that, on closer analysis, some were "not as common as I had previously thought" (Tr. 828-29).

[10] *See, e.g.*, Tr. 607 (discussing similarities in "Title-Hook Phrase," including lyric, pitch series, and rhythms; "Shifted Cadence," referring to final phrase of choruses; two instrumental figures; and relation between verse and chorus); Tr. 608 ("[w]hat is unusual, and absolutely extremely unusual, is to have all of these significant elements in two separate pieces"); Tr. 657-58 ("To find all seven or eight of these individual elements, there are five main ones but remember, the title hook there's a combination of three individual elements to my way of thinking was just an impossible thing. It would not happen."); Tr. 659 ("the combination of elements makes the Isley composition a protectible expression"; "Q: It's the combination, you say? A: Yes, as with any song. Most popular music is simple by nature. It's that way because it's intended to appeal to a large segment of the population. That's the nature of popular music. Keep it simple and as a result, much of the material taken individually, like pitch sequence for example, is very frequently common; but when you put it all together, it creates an individual expression. The Isley Brothers 'Love Is A Wonderful Thing' is itself a unique expression."); Tr. 781 ("because of the combination of those elements in this manner, it becomes in itself, although short, a unique expression").

15a (quoting Tr. 1236).[11] In short, there is neither a misstatement nor a misapplication of the law of substantial similarity in this case.

C. Inverse Ratio Rule

Petitioners' third question (Pet. 12-13) relates to, though it does not directly involve, the "inverse ratio rule," which "requires a lesser showing of substantial similarity if there is a strong showing of access" (Pet. App. 17a). That rule itself, as petitioners accept, is not applicable to or at issue in this case. *Id.* Rather, even while they note some judicial questioning of the rule (*id.*), petitioners complain that the Ninth Circuit refused to extend it to adopt a new "corollary," under which, when proof of access is "weak" but nevertheless sufficient to support a finding of access, a finding of copying would require something greater than the ordinary "substantial similarity" (Pet. 12-13)—though presumably less than the "striking similarity" already recognized as making proof of access altogether unnecessary (*see* Pet. App. 14a). There is no basis for review of this contention.

Petitioners do not even suggest an intercircuit conflict. Indeed, they do not identify any judicial decision, much less a court of appeals' decision, adopting a requirement of stronger-than-substantial similarity when proof of access is sufficient though "weak." More generally, there is no reason to think that this is an issue of great and recurring importance. That is reason enough to deny review.

Moreover, the refusal to adopt the suggested principle—which is relevant only to the factual issue of copying, not to

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[11] *See also* Tr. 1174-75 and 1212 (agreeing to similarities in title motif; musical settings; "blues gospel style," including "little figures or elements"; appearance of verse in chorus; repeat coda section varying from chorus); Tr. 1172 ("Q: "you are not suggesting that there's not room for another opinion that might differ from yours in this case, are you, sir? A: I can't do that.").

the issue of legal protectibility —makes eminent sense. The ultimate factual inquiry is "copying"; the jury here had to make such a separate finding, after finding the constituent elements of access and substantial similarity; and that finding had to be one that a reasonable finder of fact could make on the evidence. The requirements of copyright law are fully met by such standards, without the ill-advised proliferation of needlessly multiplied standards of "similarity"—"substantial," "striking," and (petitioners propose) some additional unspecified standard.

Petitioners' only argument for their proposed principle is an unelaborated invocation of symmetry based on the inverse ratio rule. But the real-world practical impact of the rule petitioners take as their premise is unproved: the jury must make a finding of copying (above and beyond its findings of access and similarity), which must be reviewed for sufficient evidence under the usual standards; and petitioners do not identify cases where the sufficiency determination changed as a result of the inverse ratio rule. In any event, and dispositively, even if the inverse ratio rule allowed some otherwise-unworthy plaintiffs to prevail, that fact could not logically justify adopting petitioners' proposal for *denying* relief to plaintiffs whose evidence *is* enough to show access and substantial similarity and copying. Indeed, any argument from symmetry is particularly feeble given that, as petitioners themselves note (Pet. 12-13), there has been criticism of the inverse ratio rule itself, as perhaps distracting courts from the task of directly assessing the sufficiency of the proof of copying.[12] The merits of such criticism cannot be addressed

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[12] *ARC Music Corp. v. Lee*, 296 F.2d 186 (2d Cir. 1961), which petitioners cite (Pet. 12 n.7), criticizes the "inverse ratio" idea as essentially a distraction from the factual question of access and similarity as a basis for inferring copying. Petitioners also cite *Beal v. Paramount Pictures Corp.*, 20 F.3d 454 (11th Cir. 1994), as "expressly reject[ing] the rule" (Pet. 12 n.7); the Eleventh Circuit in *Beal* said that the rule "ha[d] never been applied" in that circuit and held the argument to have been

in a case, like this one, where the rule is not even applicable (let alone outcome determinative). If there is merit to the criticism of the rule, however, petitioners' invocation of symmetry to deny relief to otherwise-worthy copyright plaintiffs—where copying *can* reasonably be inferred from the evidence—would only compound the wrong, not make a right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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waived in the case before it. 20 F.3d at 460. Petitioners do not mention that the Ninth Circuit itself once raised questions about the rule. *See Smith v. Jackson*, 84 F.3d 1213, 1218 n.5 (9th Cir. 1996) (citing earlier decision).